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The Importance of Doctor Liability in Medical Malpractice Law: China Versus the United States

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ARTICLE

Vincent R. Johnson

The Importance of Doctor Liability in Medical Malpractice Law: China Versus the United States

Abstract. Medical malpractice law in China does not work. Disappointed patients and their families, or the gangs they hire, frequently resort to physical violence, beating up doctors and disrupting hospital activities in order to extort settlements. This happens because Chinese law has failed to provide viable remedies to many victims of medical malpractice.

This dysfunctional situation (medical chaos or *yinao*) has persisted for more than two decades. Today, parents in China discourage their children from attending medical school because practicing medicine is too dangerous.

Reforming Chinese medical malpractice law will be difficult. Many factors contribute to the public's lack of confidence in both the healthcare system and judicial remedies.

Some principles of Chinese medical malpractice law—such as the informed consent doctrine—are similar to rules that apply in the United States. What is most striking about any comparison of American and Chinese medical malpractice law is the difference in focus. The American system focuses on the individual doctor. In contrast, the Chinese system focuses on the medical institution.

In the United States, the fundamental question is normally whether a doctor is personally liable for malpractice. Whether some other person or entity (e.g., a partner, a medical practice group, or a hospital) can be held vicariously liable for that same act, or liable for some other act of negligence, is generally a subsidiary question. This is true because doctors normally have medical malpractice insurance sufficient to cover a judgment or settlement.

In contrast, in China, the focus of the liability inquiry is always on the entity, not on the individual practitioner. Only medical institutions can be liable for medical malpractice. Individual medical staff members always escape tort liability because they cannot be sued.

This article argues that Chinese lawmakers should reform China's medical malpractice law so that medical personnel are subject to individual responsibility for harm caused by their own blameworthy conduct. Imposing a risk of liability will spur attention to issues relating to the quality of medical care and doctor-patient relations. It will also create a needed incentive for doctors to engage in safe practices and deter the occurrence of unnecessary acts of negligence related to the practice of medicine.

The plight of Chinese medical malpractice law is instructive for those who deal with issues related to the losses caused by legal malpractice. The ultimate test for any body of law addressing issues of professional liability is whether the law operates with a sufficient degree of fairness that aggrieved individuals are willing to resolve their disputes through legal channels, rather than by resorting to brute force.

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Dean Johnson has served as a Fulbright Scholar in China, Romania, and Burma and as a Fellow at the Supreme Court of the United States. He is an elected member of the American Law Institute. His books on American tort law and legal malpractice law have been used as required reading at more than forty American law schools. His articles have been cited or quoted by more than five dozen federal and state court decisions and in more than 210 law reviews. On the subject of this article, he has twice lectured at Peking Union Medical College in Beijing.

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I. DYSFUNCTION IN CHINESE MEDICAL MALPRACTICE LAW

China has made important strides in building a modern legal system,¹ including a tort-liability regime for resolving disputes arising from personal injury or property damage.² However, some parts of that regime appear to be notably deficient.³ One such area concerns the rules governing medical malpractice claims.

Many potential claimants do not believe that Chinese medical malpractice law offers a fair and efficient mechanism for resolving disputes against medical care providers. According to the Chinese domestic press,⁴ and its

1. See, e.g., Mo Zhang, *Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China*, 26 WASH. INT'L L.J. 269, 305 (2017) ("The guiding case system is a special product of the Chinese judiciary . . . [which] reflects the ambition of the Supreme People's Court to push toward the law-making power [It] represents a new trend of legal development in China—a merger of civil law tradition with common law practice."); but see Chenglin Liu, *Escaping Liability Via Forum Non Conveniens: ConocoPhillips's Oil Spill in China*, 17 U. PA. J.L. & SOC. CHANGE 137, 155 (2014) ("When the [Chinese] government believes written laws constrain it, the government does not alter its action to conform to the law; instead, it simply ignores the law.").

2. See Ellen M. Bublick, *China's New Tort Law: The Promise of Reasonable Care*, 13 ASIAN-PAC. L. & POL'Y J. 36, 37 (2011) ("[T]he tireless and continued work of so many eminent Chinese scholars to bring the new Tort Liability Law to fruition provides reason for optimism."); Vincent R. Johnson, *The Rule of Law and Enforcement of Chinese Tort Law*, 34 T. JEFFERSON L. REV. 43, 80–83 (2011) (describing the coverage and features of the Chinese tort liability law that took effect in 2010).

3. See Chenglin Liu, *Socialized Liability in Chinese Tort Law*, 59 HARV. INT'L. L.J. 16, 17–18 (2018), https://harvardilj.org/wp-content/uploads/sites/15/Liu_FORMATTED-4-19-18.pdf [<https://perma.cc/F2QK-DL2E>] (arguing Chinese Tort Liability Law "is deeply characterized by socialism and is used as a tool to maintain social stability, which is the overwhelming goal of the state" and that therefore "[i]t is impossible for the TLL to remain independent and free from political influence."); Vincent R. Johnson, *Punitive Damages, Chinese Tort Law, and the American Experience*, 9 FRONTIERS L. CHINA 321, 326 (2014) (stating despite the Chinese Tort Liability Law's authorization of punitive damages in products liability actions, "punitive damages have never been awarded by a Chinese court."); Johnson, *supra* note 2, at 87 ("[In China], there are no provisions for aggregate litigation (e.g., class actions) . . .").

4. See Alice Yan, *Chinese Man Detained Over Attack on Doctors Who Refused to Give His Wife a Caesarean*, S. CHINA MORNING POST (Oct. 15, 2018, 6:07 PM), <https://www.scmp.com/print/news/china/society/article/2168649/chinese-man-detained-over-attack-doctors-who-refused-give-his> [<https://perma.cc/88QF-EZDH>] (discussing an attack on three doctors); *Central South University Describes Findings in Nursing (Understanding the Rise of Yinao in China)*, CHINA WKLY. NEWS, June 13, 2017, 2017 WLNR 18534129 [hereinafter *Central South Univ.*] ("Yinao (healthcare disturbance) refers to violent incidents directed against healthcare staff and facilities for financial benefit. In China, incidences of Yinao are widespread and increasing . . .").

international counterparts,⁵ as well as scholarly books⁶ and articles,⁷ doctors and nurses⁸ in China are often⁹ physically attacked by aggrieved patients and their families.¹⁰ The resulting injuries are often serious¹¹ and sometimes deadly.¹² Between 2016 and 2018, at least 7,816 persons in

5. See Barbara Demick, *Hospital in China Fends Off Angry Mob*, L.A. TIMES (Aug. 25, 2011, 12:00 AM), <http://articles.latimes.com/2011/aug/25/world/la-fg-china-hospital-20110825> [<https://perma.cc/ZRC2-Q9MU>] (“Friends and relatives of a patient who died on the operating table marched on Nanchang Hospital No. 1 brandishing pitchforks and clubs.”); Emily Rauhala, *Chinese Doctors to Disgruntled Patients: Please Stop Stabbing Us*, WASH. POST (July 22, 2015, 8:43 AM), https://www.washingtonpost.com/news/worldviews/wp/2015/07/22/chinese-doctors-to-disgruntled-patients-please-stop-stabbing-us/?utm_term=.35b29f6139e7 [<https://perma.cc/T5ZE-5FBV>] (stating violence against medical staff “is widespread – and may be getting worse.”).

6. See XIAOWEI YU, PREVENTING MEDICAL MALPRACTICE AND COMPENSATING VICTIMISED PATIENTS IN CHINA: A LAW AND ECONOMICS PERSPECTIVE 9–11 (2017) (discussing “incidents of violence or protest arising from medical disputes” and “coercive measures [that] are extremely violent, such as assault and battery, false imprisonment and vandalism.”).

7. See Benjamin L. Liebman, *Malpractice Mobs: Medical Dispute Resolution in China*, 113 COLUM. L. REV. 181, 182–83 (2013) (“Many disputes result in violence. . . . [O]fficial data paint a grim picture.”); Jordan Kearney, Comment, *Why China’s 2010 Medical Malpractice Reform Fails to Reform Medical Malpractice*, 26 EMORY INT’L L. REV. 1039, 1040 (2012) (“[A]ttacks on hospitals and healthcare workers are symptomatic of a widespread discontent with the Chinese healthcare system and the government that regulates it.”).

8. See *Central South Univ.*, *supra* note 4 (“Both doctors and nurses have been the targets of violent and distressing Yinao events, resulting in emotional pain, physical injury, and even death.”).

9. See Sui-Lee Wee, *China’s Health Care Crisis: Lines Before Dawn, Violence and ‘No Trust’*, N.Y. TIMES (Sept. 30, 2018), <https://www.nytimes.com/2018/09/30/business/china-health-care-doctors.html> [<https://perma.cc/Y93G-KY2A>] (“[A]ttacks on doctors are so common . . .”); Charlie Campbell, *Doctors in China Get Attacked So Often They Now Need Armed Police Guards*, TIME (July 12, 2016), <https://time.com/4402311/china-attacks-doctors-medical-police-medicine-healthcare/> [<https://perma.cc/7NH7-B8ZM>] (asserting that violence against medical professionals is a “common problem”).

10. See Chris Buckley, *A Danger for Doctors in China: Patients’ Angry Relatives*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/world/asia/china-attacks-doctors-hospitals.html> [<https://perma.cc/YA2J-8GUA>] (discussing a fatal blow to a doctor’s skull); Mimi Lau, *Chinese Doctor Beaten by Patient’s Relatives While Medical Team at Scene Battled to Save Collapsed Woman’s Life*, S. CHINA MORNING POST (Jan. 6, 2016, 2:00 PM), <https://www.scmp.com/print/news/china/society/article/1898346/chinese-doctor-beaten-patients-relatives-while-medical-team-scene> [<https://perma.cc/4H2Z-EM92>] (“The media in China regularly reports on assaults against doctors and nurses by patients’ relatives . . .”).

11. See Lau, *supra* note 10 (discussing spinal injuries).

12. See Chauncey Jung, *‘Random’, ‘Shocking’, ‘Pointless’: Female Military Doctor Stabbed to Death in Tianjin Hospital*, WHAT’S ON WEIBO (July 17, 2018), <https://www.whatsonweibo.com/random-shocking-pointless-female-military-doctor-stabbed-to-death-in-tianjin-hospital/> [<https://perma.cc/7BLQ-QGJ2>] (discussing “[t]he fatal stabbing of a female military doctor”); Yujing Liu, *Chinese Doctor Stabbed to Death After Row with Patient’s Husband*, S. CHINA MORNING POST (Mar. 15, 2018, 6:45 PM), <https://www.scmp.com/print/news/china/society/article/2137374/chinese-doctor-stabbed-death-after-row-patients-husband> [<https://perma.cc/CDG6-KBEV>] (“stabbed in the heart”); Laura Zhou,

China were prosecuted for “for intentionally injuring medical staff or inciting crowds at hospitals.”¹³

Such violence against medical personnel is not new in China. It has persisted for well more than a decade,¹⁴ and is “increasingly frequent.”¹⁵ In addition, hired gangs frequently stage disruptions (called *yinao*¹⁶) at hospitals to coerce the settlement of real or fabricated medical claims.¹⁷ Some scholars have suggested that the *yinao* phenomenon is “unique to China,”¹⁸ largely unknown in other parts of the world.

The risk of violence to medical personnel is so great that Chinese parents are reluctant to see their children choose medicine as a career because it is too dangerous.¹⁹ A recent study by the University of Macau found that in 2016, more than 62% of “medical staff had been [verbally] abused or

Retired Dentist Dies After Being Stabbed by Ex-patient, S. CHINA MORNING POST (May 7, 2016, 10:44 PM), <https://www.scmp.com/news/china/article/1942185/retired-dentist-dies-after-being-stabbed-ex-patient> [<https://perma.cc/PR36-5KQU>] (“multiple stabs to his head, chest, abdomen, and arms”).

13. See Liu, *supra* note 12 (stating “[a] total of 7,816 people have been prosecuted for intentionally injuring medical staff or inciting crowds at hospitals since 2016 . . .”).

14. See *id.* (“[V]iolence against medical professionals . . . has haunted China for the past decade . . .”); Campbell, *supra* note 9 (“[T]he average annual number of assaults per hospital rose from 20.6 in 2008 to 27.3 in 2012.”).

15. See *Healthcare Reforms Fundamental to End Attacks on Doctors*, CHINA DAILY (July 16, 2018), <http://www.chinadaily.com.cn/a/201807/16/WS5b4be174a310796df4df68bc.html> [<https://perma.cc/2Q3J-QVMJ>] (noting “[v]iolence against medical staff . . . has become increasingly frequent”).

16. See Benjamin L. Liebman, *Law in the Shadow of Violence: Can Law Help to Improve Doctor-Patient Trust in China?*, 30 COLUM. J. ASIAN L. 113, 115 (2016) (explaining “[Y]inao” literally means “medical chaos,” and is “the term most commonly used to describe patient protest”); *id.* (“In my interactions with doctors, hospital officials, lawyers, and academics there has been near consensus that violence against medical staff and egregious forms of malpractice are common.”).

17. See YU, *supra* note 6, at 9 (discussing “professional hospital trouble makers” who cause disturbances to coerce settlements of disputes, in which they profit on a contingent fee basis); see also Liebman, *supra* note 7, at 186 (“The threat of protest, often including violence, leads hospitals to settle claims for more money than would be available in court . . .”).

18. See Liuyi Zhang et al., *Understanding the Rise of Yinao in China: A Commentary on the Little Known Phenomenon of Healthcare Violence*, 19 NURSING & HEALTH SCI. 183, 183 (2017), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/nhs.12311> [<https://perma.cc/G9EP-7H3H>] (expressing “[y]inao appears to be unique to China as little is known of it in the wider global community.”).

19. See Campbell, *supra* note 9 (according to Li Huijuan, a lawyer specializing in medical disputes, “[n]ow 90% of the doctors I visit don’t want their children to become doctors”).

assaulted by patients.”²⁰ Chinese doctors often now need armed guards to protect their safety.²¹

While violence against doctors sometimes occurs in other countries, such as India,²² such problems are virtually unheard of in the United States.²³ American doctors are normally held in high regard, and the use of violence against doctors is extremely rare. By comparison to the distressing situation in China,²⁴ even the slow²⁵ and expensive²⁶ American process for resolving medical malpractice disputes seems like a model of efficiency and enlightenment. American medical malpractice law is severely criticized in some quarters, but it seems to work well as a mechanism for securing the *peaceful* resolution (or abandonment) of claims.²⁷ American patients and

20. Zhuang Pinghui, *Chinese Government Worker Detained for Attack that Left Doctor Needing Hospital Treatment*, S. CHINA MORNING POST, (May 23, 2019, 7:27 PM), <https://www.scmp.com/news/china/society/article/3011552/chinese-government-worker-detained-attack-left-doctor-need-ing> [<https://perma.cc/WG9V-BN5K>].

21. See Campbell, *supra* note 9 (discussing the use of “armed police to guard hospitals”).

22. See Kanjash Gosh, *Violence Against Doctors: A Wake-up Call*, INDIAN J. MED. RES. (Aug. 10, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6206759/> [<https://perma.cc/X2CQ-RRE5>] (discussing violence against doctors in India).

23. But see St. John Barned-Smith, Samantha Ketterer, & Keri Blakinger, *Slaying Suspect Discarded His Possessions*, SAN ANTONIO EXPRESS-NEWS, Aug. 3, 2018, at A2 (stating police speculated that the suspect in the murder of a doctor harbored a grudge against the doctor “after his mother died under the doctor’s care 20 years earlier.”); Keri Blakinger & Samantha Ketterer, *Man Accused of Doc’s Slaying Kills Himself*, SAN ANTONIO EXPRESS-NEWS, Aug. 4, 2018, at A1, A6 (noting that “a two-week saga . . . rattled the city’s medical community” and that in “recent months . . . [the suspect had compiled] a list of two dozen other medical professionals,” who presumably might have been potential targets. The suspect “shot himself in the head in front of two Houston police officers trying to arrest him.”).

24. See Pinghui, *supra* note 20 (describing a Chinese father who “became convinced that he had not been told exactly how serious his daughter’s illness was and . . . started smashing computers . . . [and] attack[ing] the doctor”).

25. See Andrea L. Davulis, *Tired of Tribunals: A Proposal to Combine Section 60L’s “Notice of Claim” Requirement with Certificates of Merit in Massachusetts Medical Malpractice Litigation*, 48 SUFFOLK U. L. REV. 867, 867 (2015) (“Medical malpractice litigation is complex, lengthy, and thus costly.”).

26. See Lydia Nussbaum, *Trial and Error: Legislating ADR for Medical Malpractice Reform*, 76 MD. L. REV. 247, 256 (2017) (“[W]hen it comes to compensating patients, the increasing cost, complexity, and interconnectedness of delivering and paying for modern healthcare not only makes the preliminary question of proximate causation difficult to prove in all but the most extreme cases, but it also means payouts in patient compensation for those few extreme cases are tremendously high.”); see also Bublick, *supra* note 2, at 50 (“In the United States, for every dollar paid out in tort liability approximately forty cents is paid for litigation costs.”).

27. See Sophia Yin, *Inside the Doctor-Patient Relationship of China*, YALE GLOBAL HEALTH REV. (May 14, 2017), <https://yaleglobalhealthreview.com/2017/05/14/inside-the-doctor-patient-relationship-of-china/> [<https://perma.cc/7FBA-MMK6>] (stating “[t]hrough the US medical malpractice system is by no means perfect, it generally provides an adequate avenue for expressing grievances.

their families do not beat up doctors or hire gangs to disrupt hospital operations. The parties settle many claims in the United States on terms they find mutually agreeable.²⁸ If a settlement cannot be reached, claimants often litigate their right to compensation in courts of law or before arbitration tribunals. When those processes have run their course, even disappointed parties virtually always accept the terms of a final judgment.

This article will consider from a comparative legal perspective what is wrong with Chinese medical malpractice law. American medical malpractice litigation will be used as a point of reference and an example of how liability rules might operate differently—and perhaps more satisfactorily—in addressing the merits of malpractice claims raised by Chinese patients or their family members or survivors.

Part II considers the competing interests that inevitably shape medical malpractice law, the goals of an effective tort system in this type of litigation, and the importance of crafting fair rules and procedures for the compensation of medical injuries. Part III surveys the main substantive features of Chinese medical malpractice law, the difficult realities of medical practice in China, and potential deficiencies in China's medical injury litigation process. Part IV then focuses on the most notable way in which Chinese medical malpractice law differs from its American counterpart, namely China's broad imposition of enterprise liability on medical institutions to the exclusion of any personal tort liability on the doctors and other actors who commit malpractice. The article argues that the policies favoring deterrence of unnecessary losses warrant a re-examination of the absence in China of individual liability for medical malpractice. Part V offers concluding thoughts about whether imposing individual responsibility on the persons who actually commit malpractice could create incentives that would reduce the risks of violence against health care personnel and the disruption to medical institutions in China.

Injured patients are less likely to feel the need to take matters into their own hands outside of the law.”).

28. Some American experts recommend that typically adversarial settlement processes be replaced by processes structured under nonadversarial principles. See Kathleen Clark, *The Use of Collaborative Law in Medical Error Situations*, 19 HEALTH LAW. 19, 19 (2007) (“Collaborative law focuses more on finding solutions than on finding fault. It recognizes concepts of fairness. . . . This process is controlled by the parties and involves both total transparency and total respect for all involved. Collaborative law offers a ‘natural fit’ in the medical error context, encouraging immediate participation of the parties, in consultation with their attorneys, once medical error has been alleged.”).

II. THE GOALS OF MEDICAL MALPRACTICE LAW

A. *Competing Interests*

Any effective body of medical malpractice law must articulate rules and processes that fairly balance the interests of patients, doctors, health care institutions, and the public as a whole. Patients must be protected from unnecessary harm by rules that efficiently²⁹ deter careless practices³⁰ and provide adequate compensation³¹ when unnecessary harm occurs.³² Doctors must be protected from frivolous claims³³ and from the erroneous imposition of liability for harm³⁴ that was caused not by malpractice but by

29. See Erin E. Dine, Comment, *Money Will Likely Be the Carrot, but What Stick Will Keep ACOs Accountable?*, 47 LOY. U. CHI. L.J. 1377, 1418 (2016) (“A health care system’s cost-containment efforts must align within quality goals and physicians must be held accountable for the injuries that result when cost-containment goals are prioritized over quality.”).

30. See Grant E. Brown, *Reconsidering the Superseding Cause Defense in Failure-to-Diagnose Cases*, 42 VT. L. REV. 529, 555 (2018) (noting the goal of deterring medical negligence); see also Chih-Ming Liang, *Rethinking the Tort Liability System and Patient Safety: From the Conventional Wisdom to Learning from Litigation*, 12 IND. HEALTH L. REV. 327, 330 (2015) (“[P]roviders increasingly view litigation as an opportunity to improve patient safety”); Bublick, *supra* note 2, at 46 (demonstrating how tort law can act not only as a means for securing compensation for harm that has already occurred, but as a “vehicle for internalization of the costs of injuries and ultimately deterrence.”).

31. See Brown, *supra* note 30 (noting the goal in medical malpractice law of providing “a better opportunity to make plaintiffs whole”).

32. “The objectives of medical malpractice are ‘to increase the quality of healthcare through deterrence of future incidences of malpractice and to provide sufficient redress for injuries resulting from actual negligence.’” Emily S. Madden, Comment, *One Nation, Even in Tort Law: How States Can Preempt or Circumvent Federal Preemption of Noneconomic Damage Limitations*, 18 WYO. L. REV. 53, 58 (2018) (quoting Kyle Miller, Note, *Putting the Caps on Caps: Reconciling the Goal of Medical Malpractice Reform with the Twin Objectives of Tort Law*, 59 VAND. L. REV. 1457, 1470 (2006)); see also Edward A. Dauer & Leonard J. Marcus, *Adapting Mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement*, 60 L. & CONTEMP. PROBS. 185, 185 (1997) (“According to conventional theory, the tort liability system serves two objectives: compensating injured persons, and causing other persons to internalize the costs of their errors and thus to guard against them in the future.”).

33. See Marcus Jardine, Note, *Torts: No Statutory Interpretation Required—Guzick v. Kimball*, 43 MITCHELL HAMLINE L. REV. 265, 275 (2017) (discussing a medical malpractice statute reflecting concerns about frivolous claims); Mary Katherine Smith, Note, *Enough with the White Lie-ability: Decreasing Frivolous Health Care Liability Actions in Tennessee with Time and Transparency*, 46 U. MEM. L. REV. 503, 519 (2015) (stating transparent disclosure of medical errors serves “the goal of decreasing frivolous medical malpractice claims.”).

34. See Nussbaum, *supra* note 26, at 254 (“A central principle of tort [law] is that a person harmed by someone else’s misbehavior should not have to bear the burden of the injury The ‘correction’ of corrective justice refers to shifting responsibility for the harm from the victim to the culpable party. To enable this ‘correction,’ the tort lawsuit sets up a ‘contest between two parties’ and asks whether the plaintiff’s loss is the fault of the defendant and whether that loss was a foreseeable

other factors, including the natural decline in bodily functions, which inevitably occurs as a consequence of aging. While health care institutions may reasonably be called upon to internalize the costs of errors associated with their activities³⁵ and to spread those losses broadly through insurance or pricing measures,³⁶ they must be protected from unwarranted interference with their business operations and with the exercise of professional judgment³⁷ that is a necessary component of the practice of medicine. The public, in general, must also be safeguarded from the types of professional incompetence and deficient practices that corrode the confidence of the citizenry in health care systems.³⁸

To be optimally effective, a liability regime that addresses the injury costs associated with health care must advance multiple goals. Those goals include fair compensation for injured patients, effective deterrence of careless practices, adequate protection for the exercise of professional judgment in complex circumstances, efficient use of limited resources for accident prevention, and appropriate distribution of the costs of medical accidents.

The interests and goals mentioned here are referenced so frequently in court decisions and legal literature that they cannot be ignored. Developed cultures across the globe recognize them. As the discussion in Part III makes clear, the key substantive provisions of Chinese medical malpractice laws are similar to parallel provisions in American law and presumably

consequence of the defendant's action."); see also Liebman, *supra* note 16, at 113 ("Limited evidence suggests that the [Chinese] legal system does a poor job of separating valid from invalid claims.").

35. See Kearney, *supra* note 7, at 1044 ("Tort law seeks to force people to internalize the externalities of their own behavior, which is to say that tort law forces an actor to compensate those who suffer the consequences of the actor's behavior.").

36. See Brown, *supra* note 30 (noting the goal in medical malpractice law of spreading losses broadly).

37. See Joseph H. King, Jr., *Reconciling the Exercise of Judgment and the Objective Standard of Care in Medical Malpractice*, 52 OKLA. L. REV. 49, 83 (1999) ("[A] provider who chooses one approach among reasonable, professionally acceptable alternative therapeutic approaches should not be held liable merely because it appears, *in retrospect*, that some other reasonable approach might have changed the therapeutic outcome or prognosis."). In law, as in medicine, legal protection for the exercise of professional judgment is important because "the relevant facts and laws may be so numerous, complex, or uncertain that there may be more than one course of action that is reasonable under the circumstances." Vincent R. Johnson, *Legal Malpractice in International Business Transactions*, 44 HOFSTRA L. REV. 325, 344 (2015).

38. In much the same way that the effectiveness of a legal system depends upon public confidence, a system for providing medical services cannot operate effectively without respect from the public. Cf. Johnson, *supra* note 2, at 75 ("[T]he success of a peaceful substitute for unlawful forms of dispute resolution depends upon the perceived legitimacy of the alternative.").

animated by social and legal concerns that are similar to those that have shaped the law of the United States and other countries. Indeed, the introductory provisions to the Chinese Tort Liability Law reflect a legal world-view that is no narrower than the American view, and perhaps broader. Article 1 states:

In order to protect the legitimate rights and interests of parties in civil law relationships, clarify the tort liability, prevent and punish tortious conduct, and promote the social harmony and stability, this Law is formulated.³⁹

Article 2 then states:

Those who infringe upon civil rights and interests shall be subject to the tort liability according to this Law.

“Civil rights and interests” used in this Law shall include the right to life, the right to health, the right to name, the right to reputation, the right to honor, . . . [the] right of privacy, . . . and other personal and property rights and interests.⁴⁰

B. *The Task of Balancing*

If a country's medical malpractice law unduly favors or disregards the interests of any of the four key groups—patients, doctors, health care institutions, or the public—it cannot be optimally effective in performing the role with which it is charged. More specifically, if medical malpractice law is unbalanced, then the losers—often patients and their families—may seek recourse, not in the halls of justice, but through physical violence, theft, and other illegal means that tear at the fabric of a civilized society.⁴¹

In medical malpractice disputes, it is often less than clear whether a claim or defense is meritorious.⁴² In such instances, for a litigation system to

39. Tort Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), ch. 1, art. 1, <https://wipolex.wipo.int/en/text/182630> [<https://perma.cc/V2H8-VTAN>].

40. *Id.* art. 2.

41. See Liebman, *supra* note 16, at 114–15 (stating in China, “[p]rotest has become a routine tool for patients seeking compensation from hospitals, both in instances of clear negligence and in cases of adverse outcomes.”).

42. This would seem to be particularly true in China where “[c]ausation is undefined.” YU, *supra* note 6, at 112; see also *id.* (“The tort [law] is silent on how to deal with uncertainty over causation, especially in cases where a non-tortious factor (i.e., the patient's pre-existing condition) is involved.”).

remain viable, each side must have a fair chance to present its case, challenge opposing evidence, and ultimately prevail. If the relevant rules or procedures unreasonably deprive one of the parties of a fair day in court⁴³ or another viable opportunity to triumph, then parties will resort to other means for airing their grievances outside the legal system.⁴⁴ It is consequently important for every country to regularly re-examine whether its medical malpractice law and related compensation systems⁴⁵ operate fairly.⁴⁶ In litigation, as in arbitration,⁴⁷ fairness in the decision-making process is key.

43. *Cf.* Jardine, *supra* note 33 (discussing a medical malpractice statute reflecting concerns about judicial dismissal of meritorious claims).

44. In the United States, the situation is much the same with respect to legal malpractice claims. As I stated in another article addressing that field of tort liability:

For legal malpractice litigation to remain a viable system for resolving lawyer-client disputes, each side must have a fair chance of winning when the facts and equities are on their side. Otherwise, on the one hand, clients might resort to violence against lawyers and other self-help remedies, just as patients today in China, who are deprived of viable medical malpractice remedies, hire gangs to beat up doctors and otherwise disrupt hospital business.

Vincent R. Johnson, *Causation and “Legal Certainty” in Legal Malpractice Law*, 8 ST. MARY’S J. ON LEGAL MAL. & ETHICS 374, 398 (2018). In China, there is nothing comparable to the well-developed body of legal malpractice law that is robustly litigated in American courts and plays an influential role in shaping the conduct of the more than a million lawyers who practice law in the United States. *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 48–58 (AM. LAW INST. 2000) (discussing lawyer civil liability under American law); Susan S. Fortney & Vincent R. Johnson, *Legal Malpractice* §§ 5-1 to 5-8, in *LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION* (West Academic Press, 2018).

45. In the United States, some claims that might otherwise be litigated under medical malpractice principles are covered by the National Vaccine Injury Compensation Program. Persons are entitled to compensation for vaccine-caused injuries without the necessity of proving the manufacturer or administrator was at fault. Victims may reject an award under the program and sue in tort, but the doctrinal limitations imposed by federal law often make that an undesirable course. *See generally* *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011) (discussing the vaccine act).

46. *Cf.* Susan S. Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV. 2033, 2056 (2017) (“[I]t is time to reexamine whether our civil liability regime provides meaningful remedies to numerous consumers injured by attorney misconduct.”).

47. *Cf.* Larry A. DiMatteo, *Soft Law and the Principle of Fair and Equitable Decision Making in International Contract Arbitration*, 1 CHINESE J. COMP. L. 221, 255 (2013) (“[F]air and equitable decision making . . . [is] the unifying principle that binds international commercial arbitration and soft law.”); Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 398 (2018) (“To assure that Kaiser’s arbitration system met its stated goals of providing fair, efficient, and timely resolution of medical malpractice disputes against its providers, the Panel recommended that the health maintenance organization appoint an independent monitor to regularly audit and report process performance and outcomes.”).

III. MEDICAL MALPRACTICE LAW IN CHINA

A. *Substantive Provisions in China's Tort Liability Law*

The main principles of Chinese law governing medical malpractice actions are set forth in articles 54 to 64 of the Tort Liability Law, which came into force in 2010.⁴⁸ Liability is normally based on fault,⁴⁹ but imposed only on medical institutions, not on individual medical staff members.⁵⁰ Article 54 states:

Where a patient sustains any harm during diagnosis and treatment, if the medical institution or any of its medical staff is at fault, the medical institution shall assume the compensatory liability.⁵¹

This provision “imposes liability on hospitals exclusively without granting a right of recourse against negligent medical staff members.”⁵²

As in American law,⁵³ there is a duty under Chinese law to obtain informed consent to medical treatment. Under the terms of Article 55:

48. See Wei Zhang, *Understanding the Law of Torts in China: A Political Economy Perspective*, 11 U. PA. ASIAN L. REV. 171, 172 (2016) (“[E]ffective on July 1, 2010 . . .”).

49. But see YU, *supra* note 6, at 113 (“[A]rticle 59 . . . provides a basis for medical products liability, which is based on strict liability.”).

50. See *id.* at 29–30 (“In China, health workers . . . are considered to comprise a [broad] range of persons employed in medical and health institutions Only those who provide medical care service, namely medical technical personnel and village doctors and assistants, are medical practitioners who are likely to be involved in malpractice disputes, in which case they are universally termed ‘medical staff members’ In China, all medical staff members must register and work at medical institutions, and also have to practice medicine under the name of their medical institutions. Even if there is only one doctor practicing in his/her own clinic, he/she is still deemed to be the ‘medical staff member’ of his/her medical institution.”); see also *id.* at 31 (“Currently, in China, all individual providers are medical staff members in that they must register and practice at medical institutions (even a private clinic). The doctor-patient relationship is actually the hospital-patient relationship because it is the hospital and the patient that are parties to the medical service contract.”).

51. Tort Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), ch. 1, art. 54, <https://wipolex.wipo.int/en/text/182630> [<https://perma.cc/V2H8-VTAN>].

52. YU, *supra* note 6, at 112.

53. See *Canterbury v. Spence*, 464 F.2d 772, 782 (D.C. Cir. 1972) (applying District of Columbia law); *Cobbs v. Grant*, 502 P.2d 1, 4 (Cal. 1972) (analyzing “the doctor's duty to obtain the patient's informed consent”); see also VINCENT R. JOHNSON, *MASTERING TORTS: A STUDENT'S GUIDE TO THE LAW OF TORTS* 93 (6th ed. 2018) (“Under the [informed consent] doctrine, a doctor may be held liable for negligence, even if the doctor obtained the patient's consent to treatment and exercised all due care in performing medical services, if in procuring the consent the doctor failed to disclose the material risks of, and relevant alternatives to, the proposed course of treatment.”).

During the diagnosis and treatments, the medical staff shall explain the illness condition and relevant medical measures to their patients. If any operation, special examination or special treatment is needed, the medical staff shall explain the medical risks, alternate medical treatment plans and other information to the patient in a timely manner, and obtain a written consent of the patient; or, when it is not proper to explain the information to the patient, explain the information to the close relative of the patient, and obtain a written consent of the close relative.

Where any medical staff member fails to fulfill the duties in the preceding paragraph and causes any harm to a patient, the medical institution shall assume the compensatory liability.⁵⁴

Under this provision, only medical institutions, not staff members, can be held accountable.

As under American law, medical assistance in China may be rendered in emergency circumstances, even if it is not feasible to obtain informed consent. Article 56 sets down this rule:

Where the opinion of a patient or his close relative cannot be obtained in the case of an emergency such as rescue of a patient in critic[al] condition, with the approval of the person in charge of the medical institution or an authorized person in charge, the corresponding medical measures may be taken immediately.⁵⁵

Liability for negligence (i.e., conduct that falls below the standard of care) extends in China, not surprisingly, to cases involving diagnosis and treatment. Article 57 provides:

Where any medical staff member fails to fulfill the obligations of diagnosis and treatment up to the standard at the time of the diagnosis and treatment

54. Tort Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), ch. 1, art. 55, <https://wipolex.wipo.int/en/text/182630> [<https://perma.cc/V2H8-VTAN>]; see also YU, *supra* note 6, at 112 (stating "article 55 provides a legal basis for claiming civil damages for the violation of the patient's right to informed consent . . . [but] does not specify the criteria for information disclosure.").

55. Tort Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), ch. 1, art. 56, <https://wipolex.wipo.int/en/text/182630> [<https://perma.cc/V2H8-VTAN>].

and causes any harm to a patient, the medical institution shall assume the compensatory liability.⁵⁶

However, this provision, like others discussed above, envisions only entity liability, not individual liability.

The fault on which institutional liability is based may be established in a variety of ways, including by proving that a staff member engaged in certain forms of unlawful conduct, obstruction, deception, or spoliation. According to Article 58:

Under any of the following circumstances, a medical institution shall be at fault constructively for any harm caused to a patient:

1. violating a law, administrative regulation or rule, or any other provision on the procedures and standards for diagnosis and treatment;
2. concealing or refusing to provide the medical history data related to a dispute; or
3. forging, tampering or destroying any medical history data.⁵⁷

In some cases, liability extends beyond medical institutions to other entities, namely to manufacturers of drugs, disinfectants, and medical instruments, or the suppliers of blood. Article 59 states:

Where any harm to a patient is caused by the defect of any drug, medical disinfectant or medical instrument or by the transfusion of substandard blood, the patient may require a compensation from the manufacturer or institution providing blood, or require a compensation from the medical institution. If the patient requires a compensation from the medical institution, the medical institution that has paid the compensation shall be entitled to be reimbursed by the liable manufacturer or institution providing blood.⁵⁸

There are circumstances under which a medical institution will be excused from liability. They relate to the patient's non-cooperation, emergency circumstances, and difficulties in diagnosis or treatment. Article 60 explains:

56. *Id.* art. 57.

57. *Id.* art. 58.

58. *Id.* art. 59.

Under any of the following circumstances, a medical institution shall not assume compensatory liability for any harm caused to a patient:

1. the patient or his close relative does not cooperate with the medical institution in the diagnosis and treatment in line with the procedures and standards for diagnosis and treatment;
2. the medical staff have fulfilled the duty of reasonable diagnosis and treatment in the case of an emergency such as rescue of a patient in critical condition; or
3. diagnosis and treatment of the patient is difficult due to the medical level at the time.

Under the circumstance in item 1 of the preceding paragraph, if the medical institution or any of its medical staff is also at fault, the medical institution shall assume the corresponding compensatory liability.⁵⁹

Patient records must be maintained by medical institutions and provided to patients upon request. According to Article 61:

A medical institution and its medical staff shall fill out and properly keep the hospital admission logs, medical treatment order slips, test reports, operation and anesthesia records, pathology records, nurse care records, medical expenses sheets and other medical history data according to the relevant provisions.

Where a patient files a request for consulting or copying the medical history data in the preceding paragraph, the medical institution shall provide the data.⁶⁰

Chinese patients have a right to protection of the privacy of their medical information and may recover damages for breaches of confidentiality. According to Article 62:

A medical institution and its medical staff shall keep confidential the privacy of a patient. If any privacy data of a patient is divulged or any of the medical history data of a patient is open to the public without the consent of the

59. *Id.* art. 60.

60. *Id.* art. 61.

patient, causing any harm to the patient, the medical institution shall assume the tort liability.⁶¹

Improper treatment in the form of unnecessary medical examinations is expressly addressed. Article 63 states:

A medical institution and its medical staff shall not conduct unnecessary examinations in violation of the procedures and standards for diagnosis and treatment.⁶²

Finally, the interests of medical institutions and medical staff members are acknowledged in terms that reflect the concern that has arisen as a result of the attacks on doctors and the disruptions of health care institutions which have persisted for years.⁶³ Article 64 provides:

The legitimate rights and interests of a medical institution and its medical staff shall be protected by law. Anyone who interrupts the order of the medical system or obstructs the work or life of medical staff shall be subject to legal liability.⁶⁴

These substantive rules are not very different from those that are laid down by American law.⁶⁵ In the United States, liability for medical malpractice is based on fault, and in particular, the duty to exercise

61. *Id.* art. 62.

62. *Id.* art. 63.

63. Such violence antedates the enactment of the Tort Liability Law. *See* Liebman, *supra* note 7, at 183 (“China’s Ministry of Health reported 9,831 ‘grave incidents’ of medical disputes in 2006, with 5,519 medical staff injured and property damage of 200 million yuan. The total number of medical disputes doubled between 2006 and 2008, to more than one million per year, with each medical institution in China on average confronting forty disputes.”); Yanzhong Huang, *Rising Violence Against Doctors in China*, ASIA UNBOUND (Dec 3, 2013), <https://www.cfr.org/blog/rising-violence-against-doctors-china> [<https://perma.cc/S3DT-LSS8>] (“[I]t has been a topic of media concern since the early 1990s.”).

64. Tort Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 26, 2009, effective July 1, 2010), art. 64, <https://wipolex.wipo.int/en/text/182630> [<https://perma.cc/V2H8-VTAN>].

65. *But see* Yin, *supra* note 27 (explaining why, in her view, in China “medical negligence laws are less uniform” than in the United States); Lei Gao et al., *Disclosure of Medical Errors to Patients in China*, 93 BULL. OF WORLD HEALTH ORG. 659, 659 (2015), <https://www.who.int/bulletin/volumes/93/9/14-149765.pdf> (“Many doctors in China feel uncomfortable with discussing complications or errors with patients and few recognize an ethical obligation to disclose errors.”).

reasonable care that is imposed by the law of negligence.⁶⁶ Specific examples of that obligation—in America, as in China—are the duties to preserve the confidentiality of patient information,⁶⁷ to disclose material information to patients about risks and alternatives,⁶⁸ and to obtain informed consent to medical treatment, except in limited circumstances such as emergencies.⁶⁹ As in China, the actions of doctors in the United States are measured by reference to a professional standard of care,⁷⁰ and a patient's recovery of damages may be reduced based on comparative principles.⁷¹ In addition, American medical institutions are protected from intentional interference with their property and business interests, not merely by basic rules against trespass⁷² and conversion,⁷³ but by actions to recover economic damages based on tortious interference with contracts⁷⁴ or prospectively advantageous relationships.⁷⁵

There are issues related to medical care on which the law of China and the United States seem to diverge. For example, whereas the Chinese Tort

66. *See* *Sitts v. United States*, 811 F.2d 736, 739 (2d Cir. 1987) (“A physician’s obligations to his patient are to possess at least the degree of knowledge and skill possessed by the average member of the medical profession in the community in which he practices, [and] to exercise ordinary and reasonable care in the application of that professional knowledge and skill . . .”).

67. *See* *Lawson v. Halpern-Reiss*, 212 A.3d 1213, 1219 (Vt. 2019) (joining “the consensus of jurisdictions recognizing a common-law private right of action for damages arising from a medical provider’s unauthorized disclosure of information obtained during treatment.”).

68. *See* *Deborah Heart & Lung Ctr. v. Virtua Health, Inc.*, No. A-2307-17T1, 2019 WL 3162362, at *8 (N.J. Super. Ct. App. Div. July 16, 2019) (“The doctrine of informed consent obligates physicians to disclose material risks inherent in a procedure or course of treatment so the patient may make an informed decision. . . . Under the doctrine, the physician is required to advise the patient of ‘all medical information that a reasonably prudent patient would find material[.]’ . . . and ‘the inherent and potential hazards of the proposed treatment, the alternatives to that treatment, if any, and the results likely if the patient remains untreated.’”).

69. *See* *Vick v. Khan*, C.A. No. K17C-09-007 NEP, 2019 WL 2177114, at *5 (Del. Super. Ct. May 17, 2019) (“Delaware law precludes a plaintiff from prevailing on an informed consent claim where the treatment provided arose in the context of an emergency.”).

70. *Cf.* *Sprague v. Avalon Care Ctr.*, 446 P.3d 132, 141–42 (Utah Ct. App. 2019) (discussing nursing standards of care).

71. *See* *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104 (Iowa 2011) (holding that, in a medical malpractice action, mental health professionals could raise a comparative fault defense based on a noncustodial patient’s act of suicide).

72. *Cf.* *Allentown Women’s Ctr., Inc. v. Dunkle*, No. 5:19-cv-01571-CFK, 2019 WL 2462685, at *1 (E.D. Pa. June 10, 2019) (involving an alleged trespass at a women’s clinic).

73. *See* RESTATEMENT (SECOND) OF TORTS § 223 (1965) (discussing ways of committing conversion).

74. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 16 (AM. LAW INST., Tentative Draft No. 3, 2018) (discussing liability for interference with contract).

75. *See id.* § 17 (discussing liability for interference with economic expectation).

Liability Law broadly states that “a medical institution shall be at fault constructively for any harm caused to a patient . . . [by] violating a law, administrative regulation or rule.”⁷⁶ This rule is said to place the burden of proof on the defendant.⁷⁷ In contrast, the parallel American doctrine—negligence *per se*—entails a highly nuanced inquiry into the nature of the particular statutory obligation and whether there was an excuse for the violation.⁷⁸ Some statutory violations can be used by an American plaintiff to prove that a defendant acted negligently; others cannot.

Unlike under Chinese law,⁷⁹ it is doubtful that the uncooperativeness of a family member would be imputed to a patient to bar or reduce the patient's recovery in an American medical malpractice action. Imputed comparative fault is generally disfavored under United States law.⁸⁰ For example, children are not barred from recovering damages from third persons simply because their parents may also have been negligent.⁸¹

B. *Deficient Procedures and Remedies*

Of course, substantive rules do not operate in a vacuum. They are animated or restricted by procedural rules and practices. Even if a finding of liability is made, that is meaningful only to the extent that adequate remedies are available.

Scholars have raised serious questions about the fairness of the Chinese medical malpractice litigation process.⁸² They have noted that even after the adoption of the Tort Liability Law, important questions remain unresolved about applicable legal principles,⁸³ the role that potentially

76. Tort Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, (2010)), ch. 1, art. 58, <https://wipoex.wipo.int/en/text/182630> [<https://perma.cc/V2H8-VTAN>].

77. See Liebman, *supra* note 16, at 118 (“The Tort Law . . . created an explicit cause of action, with fault assumed and the burden of proof on defendants, for any illegal conduct . . .”).

78. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 14 (AM. LAW INST. 2010) (discussing statutory violations as negligence *per se*).

79. Tort Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, (2010)), art. 60(1), <https://wipoex.wipo.int/en/text/182630> [<https://perma.cc/6W5X-S4SD>].

80. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 5 (AM. LAW INST. 2000) (discussing imputed comparative negligence).

81. See *Western Union Tel. Co. v. Hoffman*, 15 S.W. 1048, 1048 (Tex. 1891) (holding that a minor was entitled to a judgment against a third party despite his father's negligence).

82. See also Liebman, *supra* note 16, at 116 (“Although the legal framework has shifted since 2010, . . . [Chinese] patients and doctors continue to view the current system as profoundly unfair.”).

83. See *id.* at 118 (discussing unresolved problems related to two different tracks of litigation).

biased review panels play in the adjudication of claims,⁸⁴ and the damages that can be recovered in cases involving fatal medical injuries.⁸⁵ “One plaintiffs’ lawyer [in China] commented that the legal framework governing medical disputes remains one of ‘legal chaos.’”⁸⁶ Other persons have argued that recourse to remedies in the Chinese courts is impaired by a lack of transparency⁸⁷ or judicial independence,⁸⁸ weak commitment to the rule of law,⁸⁹ and corrupt practices.⁹⁰ Chinese Judges often appear not to be

84. *See id.* at 119 (“[T]he Tort Law did not address whether inspections by medical association medical review boards should continue to be a prerequisite to suits against hospitals or whether plaintiffs in medical cases may rely on inspections carried out by judicial inspection organizations.”).

85. *See* YU, *supra* note 6, at 98–103 (discussing recovery of damages in Chinese medical malpractice actions).

86. Liebman, *supra* note 16, at 120.

87. *See id.* at 117 (“The use of local doctors [in China] to determine the fault of other local doctors in a process that lacked transparency virtually guaranteed that patients would view outcomes as biased and unfair.”).

88. *See* Bublick, *supra* note 2 (“Some American scholars question whether there can be meaningful civil law in China as long as the judicial system is not independent from the political system.”); Laifan Lin, *Judicial Independence in Japan: A Re-Investigation for China*, 13 COLUM. J. ASIAN L. 185, 185 (1999) (“[I]n the history of Asian countries such as China and Japan, judicial power and administrative power have long been one integrated mass, and thus, it is difficult to establish an independent image of judicial power”); Johnson, *supra* note 2, at 90 (“China lacks both a tradition of, and dedication to, the principle of judicial independence. Courts are viewed not as a separate branch of government with a duty to check and balance the actions of other branches, but rather as administrative agencies designed to carry out governmental policy.”); *see generally* Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 FORDHAM URB. L.J. 1007, 1012 (2002) (“[J]udicial independence is not simply a function of provisions governing judicial selection, compensation, and retention of office. . . . [J]udicial ethical norms . . . shape the conduct of American judges on a daily basis and give concrete meaning to the idea that judges should be free from undue or inappropriate pressures when performing the duties of office.”).

89. *See* Vincent R. Johnson & Stephen C. Loomis, *The Rule of Law in China and the Prosecution of Li Zhuang*, 1 CHINESE J. COMP. L. 66, 72–76 (2013) (discussing the abusive prosecution of a prominent lawyer); *see also* Michael Forsythe, *Magna Carta Exhibition in China, Is Abruptly Moved From University*, N.Y. TIMES (Oct. 14, 2015), <https://www.nytimes.com/2015/10/15/world/asia/china-britain-magna-carta-renmin-university.html> [<https://perma.cc/3WXP-JW9Q>] (noting that an exhibit showing a rare copy of the Magna Carta “abruptly moved [from a planned exhibition at a university museum] to the British ambassador’s residence, with few tickets available to the public and no explanation given”).

90. *See* William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People’s Republic of China*, in RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA 287, 292–93 (William P. Alford ed., 2007) (discussing widespread corruption of legal processes in China and noting that “the expansion of the Chinese bar has been accomplished by increasing corruption, with lawyers at times a conduit for, if not the instigators of, such behavior”); Jiali (Keli) Huang, *One Country, Two Systems: Hong Kong’s Unique Status and the Development and Growth of Arbitration in China*, 18 CARDOZO J. CONFLICT RESOL. 423, 424 (2017) (noting “the reputation of the [Chinese] judiciary as corrupt”). Vincent R. Johnson, *Corruption in Education: A Global Legal Challenge*, 48 SANTA CLARA L. REV. 1, 9 (2008) (“Public corruption in China is believed to be widespread.”).

applying the law, but splitting the difference. “Compromise verdicts are frequent, with courts appearing to require each party to undertake half of the damages suffered.”⁹¹ These are important issues that have been explored elsewhere. The relevant facts and arguments will not be repeated here.

C. *Problems in Medical Care*

The dissatisfaction that leads to violence against Chinese doctors and medical institutions may be caused more by the deficiencies in medical care and other realities of life in modern China,⁹² than by problems related to the rules and procedures governing medical malpractice litigation.⁹³ According to Professor Benjamin Liebman of Columbia University:

[T]he rise in disputes and the frequency of violence in such disputes are products of a number of factors, including the marketization and cost of health care, the compensation structure for doctors, reliance on the sale of drugs by hospitals and doctors to generate income, the difficulty of obtaining appointments [for patients] at hospitals, the short time doctors spend with patients, delays in treatment, quality of care, corruption, lack of insurance for catastrophic illness, absence of a robust social safety network, and a general lack of trust in state institutions.⁹⁴

To this list may be added other contributing factors, including “poor [medical] treatment outcomes; high patient expectations; a misunderstanding or rejection of medical ethics; misleading media reports; and a complex appeals process.”⁹⁵ Patients and their families exacerbate

91. Liebman, *supra* note 16, at 124; *see also id.* (“Judges confirm that they sometimes order hospitals to pay damages in cases in which there is no evidence of error in order to appease plaintiffs and prevent protest.”).

92. *See* Yin, *supra* note 27 (stating that in China’s broken medical system, the “issues are complex and tangled, without a simple or complete solution.”).

93. *See* SIYU XIAO, TENSION IN THE CHINESE DOCTOR-PATIENT-FAMILY RELATIONSHIP: A QUALITATIVE STUDY IN HUNAN PROVINCE, *China*, YALE MED. THESIS DIG. LIBRARY 1, 86 (Jan. 2018), <https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=3460&context=ymtdl> [<https://perma.cc/F365-MPNA>] (“Reforms at the hospital and systems level are urgently needed for all patients and family to have access to a more patient-centered, informed experience.”).

94. Liebman, *supra* note 16; *see also* Liebman, *supra* note 7, at 189 (“[F]inancial risks [for patients] remain high even for those covered by the new healthcare plans.”).

95. *See Central South Univ.*, *supra* note 4 (“Causes include a lack of trust in medical staff, fueled by costly medical expenses; difficulties in accessing treatment.”); Kearney, *supra* note 7 (“The majority of the Chinese population does not have access to sufficient medical care, and those who do often receive substandard care.”); Buckley, *supra* note 10 (“[F]amilies of patients . . . driven by a visceral

medical problems by delaying consultation of doctors and foregoing prompt medical treatment. In addition, Chinese patients and their families unreasonably believe that bribes⁹⁶ in the form of under-the-table payments to doctors can produce miraculous results.⁹⁷ Disappointed patients and their families may “take out their frustrations caused by a lack of resources and an overstrained system on the doctors and nurses”⁹⁸ who provide medical services.

distrust of the health care system, subject medical staff members to humiliation and violence when they feel that patients have been mistreated or neglected.”).

96. See YU, *supra* note 6, at 2 (referring to “bribery under the cover of a cash gift”).

97. See XIAO, *supra* note 93 (discussing “unrealistically high expectations set by patients giving ‘red packets,’ or cash gifts, to doctors in hopes of securing a good outcome”); cf. Emily Rauhala, *Why China’s Doctors Are Getting Beat Up*, TIME (Mar. 7, 2014), <https://time.com/15185/chinas-doctors-overworked-underpaid-attacked/> [<https://perma.cc/DA46-3QAG>] (discussing “*hong bao*—red envelopes stuffed with cash”).

98. Pinghui, *supra* note 20.

IV. THE IMPORTANCE OF INDIVIDUAL RESPONSIBILITY IN MEDICAL MALPRACTICE LAW

A. *Individual Responsibility v. Enterprise Responsibility*

The most striking thing about any comparison of American and Chinese medical malpractice law is the difference in focus. The American system focuses on the individual doctor. In contrast, the Chinese system focuses on the medical institution. In the United States, the fundamental question is whether the doctor is personally liable for malpractice. Whether some other person or entity (e.g., a partner, a medical practice group, or a hospital⁹⁹) can be held vicariously liable for that same act (or for its own negligence) is generally a subsidiary question because doctors normally have medical malpractice insurance¹⁰⁰ which can pay a judgment or settlement.

In contrast, in China, the focus of the liability inquiry is always on the entity, not on the individual. Only medical institutions can be liable for medical malpractice. Individual medical staff members always escape tort liability because they cannot be sued.

Under American medical malpractice law, individual responsibility is the norm and enterprise responsibility sometimes provides an additional remedy. This is not surprising because, in the United States, an individual who commits a tort rarely escapes liability to an injured third party merely because, at the time of the tortious conduct, he or she was employed by another.¹⁰¹

99. See VINCENT R. JOHNSON & CHENGLIN LIU, STUDIES IN AMERICAN TORT LAW 327 (6th ed. 2018) (“Originally, [American] hospitals were free from tort liability under the doctrine of charitable immunity. Since abrogation of that doctrine . . . at least three theories have been used to hold hospitals liable for the negligence of a physician. First, *respondeat superior* [vicarious] liability may be imposed if the doctor is employed by the hospital and the negligence occurs within the scope of the doctor’s employment. Second, even if a doctor is an independent contractor, many courts hold there is an ‘ostensible agency’ . . . if the patient reasonably believes, based on the conduct of the hospital, that the physician is its employee. Finally, an increasing number of courts have endorsed the theory of ‘corporate negligence,’ under which a hospital may be held liable for failure to review a doctor’s treatment of patients or require consultation. See *Thompson v. Nason Hosp.*, 591 A.2d 703 (Pa. 1991).”).

100. See HERBERT M. KRITZER & NEIL VIDMAR, WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS 60 (2018) (“[Because] most medical doctors want to have admitting privileges at a hospital, and hospitals typically require that those with admitting privileges carry liability insurance[,] . . . few physicians practice without insurance.”).

101. In *Kingston v. Helm*, 82 S.W.3d 755 (Tex. App.—Corpus Christi 2002), the court held that the rule that an agent is liable for his or her own torts applies even when the agent is an officer or shareholder of a corporate principal corporation. As the court explained: “[t]he classic example of this

In China, in contrast, enterprise liability is the norm; individual responsibility is absent. Doctors escape tort liability for malpractice that occurs while they are working for a medical institution.¹⁰²

B. *Deterrence*

Doctors in China who commit conduct that gives rise to a successful medical malpractice claim can be disciplined or discharged by the medical institutions for which they work.¹⁰³ However, the fact that those doctors cannot be personally sued for damages undercuts the incentives they have to engage in safe practices and otherwise minimize the likelihood of claims.

American physicians are keenly mindful about the risks of being sued;¹⁰⁴ the expenses of purchasing malpractice insurance;¹⁰⁵ the costs, inconvenience, and mental turmoil of defending a claim;¹⁰⁶ and the prospect of being held liable for a substantial amount. These concerns

principle is that of a corporate agent who negligently causes an automobile accident while in the course and scope of his employment In such circumstances, the corporate agent is liable individually for his own negligent conduct.” *Kingston v. Helm*, 82 S.W.3d 755, 762 (Tex. App.—Corpus Christi 2002). According to the Restatement (Second) of Agency, the general rule is that:

An agent who does an act [that is] otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal, except where he is exercising a privilege of the principal, or a privilege held by him for the protection of the principal’s interest, or where the principal owes no duty or less than the normal duty of care to the person harmed.

RESTATEMENT (SECOND) OF AGENCY § 343 (1958).

102. See *supra* note 50.

103. See YU, *supra* note 6, at 6 (“Under the employment contract, hospitals are permitted to conduct an annual assessment of the performance of each employed provider. Those providers who fail the assessment must take necessary training or their positions will be changed accordingly. If they refuse to accept the change in positions, hospitals are entitled to terminate the employment contract unilaterally. In cases where employed providers cause medical accidents due to any breach of regulations or clinical protocols, hospitals may terminate the employment contract unilaterally at any time.”).

104. See Dine, *supra* note 29, at 1401 (In the United States, “[m]edical malpractice liability is a major concern for physicians.”).

105. See Vincent R. Johnson, *Legal Malpractice Claims: What the Data Indicate*, 9 ST. MARY’S J. LEGAL MAL. & ETHICS 138, 141 (2018) (reviewing HERBERT M. KRITZER & NEIL VIDMAR, *WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS* (2018)) (“[C]oncerns about the ‘skyrocketing,’ costs of medical malpractice insurance premiums have driven wave after wave of tort reform.”).

106. Cf. SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION* 5–9 (2d ed. 2015) (discussing the personal costs of a legal malpractice claim).

shape the way medicine is practiced in the United States.¹⁰⁷ They affect a wide range of things, spanning from how clients are treated, to what tests are ordered, to what efforts are made by doctors to stay abreast of new developments.

In China, the fact that doctors cannot be personally sued and held liable for damages must affect an equally wide range of matters related to the practice of medicine. However, because there is no risk of individual liability, the incentives are the opposite. Rather than create reasons to do more to exercise care on behalf of patients, the immunity for personal liability contributes to what scholars have called the “learned helplessness”¹⁰⁸ that adversely affects so many Chinese physicians. Just as allowing Chinese rural workers to profit from the success of the lands they farmed made those lands more productive,¹⁰⁹ holding doctors individually responsible for the injuries resulting from their conduct will tend to minimize such losses because doctors will be incentivized to act in furtherance of their own economic best interests.¹¹⁰

Exposure to personal liability might well improve doctor-patient relations. Doctors would have an incentive to listen more attentively to patients, carefully explain risks, set reasonable expectations,¹¹¹ and explore

107. Cf. Jim M. Perdue & Stephen R. Baxley, *Cutting Costs—Cutting Care: Can Texas Managed Health Care Systems and HMOs Be Liable for the Medical Malpractice of Physicians?*, 27 ST. MARY'S L.J. 23, 67 (1995) (“[T]he minor financial burden on health care costs created by finding liability for medical negligence is vastly outweighed by the deterrent effects of such liability and the need to compensate victims.”).

108. See XIAO, *supra* note 93, at 87 (asserting that in a research study Chinese “doctors seemed helpless to enact positive change for themselves and their patients, deferring the responsibility instead to the government or media culture.”).

109. See Frank Xianfeng Huang, *The Path to Clarity: Development of Property Rights in China*, 17 COLUM. J. ASIAN L. 191, 215–16 (2004) (“[R]eformers in Anhui and some other provinces started to experiment with the creative ‘household contract responsibility system’ The households were responsible for managing their allocated lands and were allowed to keep any surplus produces after meeting quotas The ‘household responsibility system’ was an immediate success, improving productivity significantly.”); Geoffrey Korff, *The Village and the City: Law, Property, and Economic Development in Rural China*, 35 SYRACUSE J. INT’L L. & COM. 399, 411 (2008) (The Household Responsibility System “was not only enormously successful in increasing agricultural output, but it also resulted in a profound rise in personal incomes for many rural Chinese.”).

110. Similar ideas have been advanced in other areas of the law. See Claire Hill & Richard Painter, *Berle’s Vision Beyond Shareholder Interests: Why Investment Bankers Should Have (Some) Personal Liability*, 33 SEATTLE U.L. REV. 1173, 1174 (2010) (“[P]ersonal liability may be the best way to make bankers approach risk in a manner that reflects the potential for externalities”).

111. See Liebman, *supra* note 16, at 126 (“[T]rust depends both on the quality of institutions and on popular expectations.”).

feasible options.¹¹² In China, there is a general lack of trust between doctors and their patients.¹¹³ It is possible that one of the reasons that the American medical malpractice system works as well as it does is that there is a minimization of hostility between doctors and patients. Even in an era of “managed care,”¹¹⁴ American patients usually trust their doctors.¹¹⁵

In China, “distrust in the healthcare system is widespread, in part because of corruption and questionable practices,”¹¹⁶ such as “[e]xcessive testing, procedures, and the prescribing of unnecessary medication.”¹¹⁷ There is a need to reduce such abuses. It is reasonable to think that doctors at risk of being held personally liable for their medical errors and other forms of malpractice would exercise greater care to protect patients from harm, and more attentive to the quality of doctor-patient relationships.

V. CONCLUDING THOUGHTS

China has endeavored to reduce violence against medical personnel and hospital disruptions.¹¹⁸ For example, “hospitals have established a series of preventative measures and the government has increased the penalties for perpetrators of acts of Yiniao.”¹¹⁹ However, these efforts, even when coupled with many legal reforms during the past decades, have proved to be insufficient to either effectively reduce violence against doctors¹²⁰ or

112. See generally Zhang *supra* note 18, at 186 (discussing how “[i]nterprofessional communication and collaboration are vital to tackling the problem of Yiniao”).

113. See Liebman, *supra* note 16, at 113.

114. “Managed care programs” are “[h]ealth insurance plans intended to reduce unnecessary health care costs through a variety of mechanisms, including: economic incentives for physicians and patients to select less costly forms of care; programs for reviewing the medical necessity of specific services; increased beneficiary cost sharing; controls on inpatient admissions and lengths of stay; the establishment of cost-sharing incentives for outpatient surgery; selective contracting with health care providers; and the intensive management of high-cost health care cases.” *Managed Care Programs*, NAT’L CTR. FOR BIOTECHNOLOGICAL INFO., <https://www.ncbi.nlm.nih.gov/mesh?term=managed%20care> [https://perma.cc/M3WR-M5UL] (last visited Aug. 25, 2019).

115. But see Jesse King & Elizabeth Tippet, *Drug Injury Advertising*, 18 YALE J. HEALTH POL’Y, L. & ETHICS 114, 128 (2019) (“Patients appear to trust their own experience and knowledge above all.”).

116. Liebman, *supra* note 7, at 191.

117. *Id.* at 188.

118. Cf. Wang Xiaodong, *People Who Attack Medical Staff to be Blacklisted*, CHINA DAILY (Oct. 10, 2018), <http://www.chinadaily.com.cn/a/201810/18/WS5bc7dff5a310eff30328307f.html> [https://perma.cc/8AFF-WNQK] (discussing punishments involving restrictions on government subsidies, government employment, and first-class travel by air and high-speed rail).

119. *Central South Univ.*, *supra* note 4.

120. See Pinghui, *supra* note 20 (“A report by the Chinese Medical Doctors Association last year said that crimes against medical staff in hospitals had dropped 15.4 per cent after the authorities’

build a medical malpractice regime that the public trusts. The missing key to the persistent¹²¹ *Yinao* problem may be the creation of legal rules that hold medical personnel individually responsible for the harm caused by their own deficient conduct. Imposing a risk of liability will spur attention issues relating to the quality of medical care and doctor-patient relations. It will create a needed¹²² incentive to engage in safe practices and will deter the occurrence of unnecessary acts of negligence related to the practice of medicine.

American doctors would undoubtedly like to trade the “American rule” for the “Chinese rule.” They would prefer to be immunized from the threat of malpractice liability. But it is difficult to see how that would make American medical care more efficient or more effective. Instead, it would likely increase the occurrence of medical malpractice.

Chinese legislators should consider carefully the disincentives caused by immunizing Chinese doctors from liability for medical malpractice claims. Permitting doctors to be subject to personal liability for malpractice might make the practice of medicine safer for both patients and doctors in China.

The plight of Chinese medical malpractice law is instructive for those who deal with issues related to the losses caused by legal malpractice. The ultimate test for any body of law addressing issues of professional liability is whether the law operates with a sufficient degree of fairness that aggrieved individuals are willing to resolve their disputes through legal channels, rather than by resorting to brute force.

crackdown, but still 66 per cent of doctors reported that they had been abused by patients, mostly verbally.”).

121. See Liebman, *supra* note 16, at 123 (“Continuing media coverage of assaults on doctors suggests that the problem remains extensive and deep-rooted.”).

122. See *id.* at 113 (“Limited evidence suggests that the [Chinese] legal system does a poor job of . . . incentivizing hospitals to reduce malpractice.”).